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THOUGHTS ON LAW REFORM... - PHILLIMORE

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THOUGHTS

ON

LAW REFORM,

AND

The Law Review,

(*February*, 1847.)

BY

JOHN GEORGE PHILLIMORE.

Betrug bleibt Betrug—LESSING. (Fraud is fraud).

" τὴν μὲν ἄρ οὐτ ἀνέμων διάει μένος ὑγρὸν ἀέντων
" οὔτε μιν Ἠέλιος φαέθων ἀκτῖσιν ἔβαλλεν
" οὔτ ὄμβρος περάασκε διαμπερές—ὣς ἄρα πυκνὴ
" ἦεν ——" ODYSS. T. 440.

"Seriem enim rerum singularium impossibile foret, humanæ imbecillitati assequi."—SPINOZA DE INTELLECTUS EMENDATIONE.

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THOUGHTS ON LAW REFORM,

&c. &c.

I HAVE often had occasion to wonder at the ignorance sometimes affected, but more frequently real, of first principles among men to whom no candid person would refuse the praise of much sagacity and perseverance. Wide views, however, and a disposition to generalize, have rarely at any time, or in any class, been the means of attaining eminence in this commercial country; and it certainly is not in the present age, and among lawyers, that we can expect to find knowledge preferred to wealth, and self improvement to mere technical distinctions. On topics of jurisprudence Tidd and Saunders are silent altogether. Little is to be gained concerning them from the *doctrina placitandi*, and if any rational being not compelled by the iron grasp of necessity, devotes his time to the perusal of Coke, it can only be from the motive which made the Spartan youth flock round a drunken Helot. The consequence of this intense devotion to the mechanical and lucrative part of law, and this absolute neglect of the nobler and more important objects to which it ought to point the way, has been, up to within a very recent period, the placing of narrowness and mediocrity, or something worse, in

the highest stations; and up to the present moment, the daily perpetration of injustice, under colour, and by means of law, to an extent which no one, who has not watched the proceedings of our Courts of Justice can imagine. In the mean time, I would earnestly entreat such of my readers as are not members of the Legal Profession, if it be not presumptuous in me to expect to meet with any such, not to suffer themselves to be scared by solemn words, and pompous phrases, not to allow dust to be thrown in their eyes by people who cant about practical knowledge, the danger of touching a complicated system, or any other of the Abracadabra so often used by those who have not the gift of reason, against those who have, in short, by the enemies of improvement, whatever form it may assume, and whatever evils it may fight against. The man who has passed years in stupifying his faculties, and making his prejudices incorrigible by the study of Saunders and Chitty, is not so fit as an ordinary person to judge of the actual evils of our system, or their proper remedies; just as a tallow chandler, who has paralyzed his sense by inhaling pestilential vapours, must yield as an authority on points affecting that sense to any person who has passed his life in a common atmosphere. It is only by blinding the reason of men, and making them believe that the principles of law are mysterious, that the ends of such people can be answered. In a refined state of society, the application of the principles of law to the complicated variety of human affairs, is a task equally difficult and laborious. But those principles themselves are

always intelligible to a person of common understanding when properly pointed out; the links which connect the premises with the conclusion are few and obvious, a deputy lieutenant may understand them, and a philosopher can do no more.

That special pleading is the great and prominent evil of our present system, that it makes the clearest right precarious, and the most dishonest pretension plausible, that so far from bringing the facts really in dispute between the parties to a clear, short, intelligible, and satisfactory issue, (on which grounds its champions assert the necessity of its continuance,) it is obvious that the purpose of its inventors was to involve the simplest and easiest subjects in the thickest obscurity and confusion the most hopeless; these are facts which any one who will take the trouble of turning over a volume of our Reports, may satisfy himself are incontrovertible. This is the system which drew down the vituperation of Bolingbroke, which edged the sarcasm of Swift, and which bears out the sayings of two men thoroughly conversant with its effects, sayings which, simple as they appear, convey to a reflecting mind as bitter a censure on the law to which they are applied, as it is in the power of man to utter. I mean the one of Lord Loughborough, that no cause was desperate; the other of Lord Abinger, which he first stated at the Bar, and afterwards repeated on the Bench, that he had never known any case decided on every point from beginning to end upon its merits. This system it is that Mr. Brougham denounced, and Lord Brougham did not sacrifice his

power to destroy; this system it is which the Judges might have destroyed, but chose rather to contract and fortify; this system it is, the effects of which, pernicious as it is to society, are exemplified no where more signally and more disastrously than in the character of those concerned, no matter how, in its administration. To me, I confess, the mere fact that the forms which now regulate our proceedings, and which are applied by perverted ingenuity to the complicated transactions of a society such as ours were, invented in a rude age, and contrived by English lawyers in the fourteenth century, appears decisive of the question.—Is law not within the province of experience?

Is there any magic in the letters which compose the words, Trover, Ejectment, Case, Trespass, that the omission or insertion of them, or others equally insignificant, should be ruinous to hundreds, to whom they convey no sort of idea, and on whom they confer no sort of benefit?

The first step should be, to abolish immediately all special demurrers. I defy the most violent advocate of the present system to allege a single reason which ought to weigh a feather in the scale for their continuance. The definition of a special demurrer is alone sufficient for its condemnation. What oppression can be more odious, or what folly more glaring, than for a Judge to say, as the law compels ours to do: "The objection made to your adversary's statement does not touch the merit of the case—it does not mislead *you* —it does not assist *him;* it has no more to do with

any one principle on which the case should be determined than the length of his nose: but—what? Begone; you are a dishonest man for having taken it? No; it shall prevail, and you shall triumph." This, however, is the language of our law. In what other code was it ever heard of, that there should be two distinct classes of technical objections, and that in one of them, to which full effect is given, should be comprised objections so ludicrous, so notoriously frivolous, so totally without any purpose but that of giving a triumph to injustice, that unless taken in a particular manner, unless pointed out as eminently and specifically formal objections, they could not be taken at all, but must be set aside as totally irrelevant to the merit of the case. If the law had been made by any but those who did make it, could such an absurdity have found its way into our institutions? Objections that can be taken only on special demurrer exist, according to the sage Lord Hobart, not for the benefit of the suitor but for that of the lawyer. They exist that the law may "make the meat it feeds on." They exist that the law may be an art. They exist lest the peculiarly daring, disinterested, and comprehensive genius of the English lawyer should lead him to think of justice too much, and of form too little; —lest there should not be difficulties enough;—lest right should triumph too often, and fraud be too much discouraged. To elicit truth, to protect right, to establish justice, is a task too easy. It might suit the Ulpians and Papinians, the D'Aguesseaus, the Malesherbes, but was an undertaking far below the Scroggs,

the Sawyers, and the Saunders, who are the boast of English jurisprudence. But let this bare mention of the evil suffice. The man who would waste a moment in arguing with the advocates of special demurrers, is unworthy of all leisure (*a*); and I fully believe that, in conformity with the general opinion of the Bar, these absurdities will speedily be abolished. But I go much further.

The means by which the other evils of special pleading might be obviated are so extremely simple, and have been practised in so many countries, that it seems scarcely necessary to insist on the possibility of avoiding them. The only question is, do we in avoiding them incur any evils, and are such evils worse than those from which it is our object to escape?

Now the purpose of special pleading is not a mysterious one, or one which it requires any great depth of capacity to comprehend, nothing serves the purpose of those who advocate abuses so well, as to persuade others that vast erudition and immense abilities, are requisite even for their consideration, and that it is the highest presumption to express an opinion on any matter however simple, which they would fain save from all inquiry and examination. Any man of plain sense and ordinary education is perfectly competent to judge, whether murderers ought to escape because the names of their victims

(*a*) "*οὐ δεῖ δὲ πᾶν πρόβλημα, οὐδὲ πᾶσαν θέσιν ἐπισκοπεῖν ἀλλ' ἢν ἀποσησειεν ἄν τις τῶν λόγου δεομένων, καὶ μὴ κολασεως ἢ αἰσθήσεως.*"—ARIST., Top. 1, c. 11.

are misstated, and whether a man ought to be deprived of his rights, because a person whom he never saw, and whom he is compelled to employ, has said that he was "willing" instead of that he was "*ready* and willing" to perform his contract.

The supposed object of special pleading, then, is simply this, to eliminate the facts which the jury and the law on which the Judge is required to decide—and so to elicit them as to prevent all surprise on either of the contending parties, whose rights or interest are to be affected by the decision (*a*).

The real effect of special pleading is, in all cases, te prevent the jury, and in some the Judges from having an idea of the real point in dispute, and to make one of the litigant parties triumph over the other, for reasons entirely beside the merit of his case.

It is not my wish, however, to abolish written pleadings altogether, an intention which has been imputed to me by a not (*b*) unfriendly critic, but to provide, that no mistake in the form of the written pleadings shall have any effect whatever on the final issue of the cause. I wish to rescue the English Courts of Justice from a system which makes their proceedings a by-word of reproach, and this purpose may easily be effected, by taking care that both parties after notice and summons, in the pre-

(*a*) The Judges themselves put in the strongest light the absurdity of special pleading, *e. g.*, we are gravely told *Rennie* v. *Beresford*, 15 *Meeson* and *Wellsby*, 78, that "the object of a bill of particulars, is to give the defendant that information which a reasonable man would require respecting the matters against which he is called upon to defend himself." If so, what is the object of the declaration?

(*b*) In the Jurist.

sence of each other, or their agents, should state in writing the demand and the answer,—the issue should then be moulded and arranged by a public officer, and sent down prepared by him for the decision of a jury. It might be done *mutatis mutandis* after this fashion.

"If the jury are of opinion the goods were supplied by A to B., they will find for A., giving such damages as they think right, unless they think B. was under age when the goods were supplied,—or unless, if he was under age, they think the goods necessaries, in the two last cases they will find for B.

"If the jury are of opinion that the close described in the schedule hereunto annexed was entered by B. at such a time, they will find for A., giving such damages as they think right, unless they think that B. had a right of way on the close, in which case they will find for B."

There is no case that a man tolerably versed in business might not reduce to a corresponding form.

It is clear, that the same faculties which now enable a man to state his case to his attorney, and enable his attorney to state it to a pleader, by whom it is as if for the purpose of confusion, thrown into a form utterly unintelligible to all but lawyers, and very often not intelligible to them, it is clear, I say, that these same faculties would enable a plaintiff so to state his case, that an attorney, or a special pleader, might write down the demand or complaint, in terms that should be intelligible to men of ordinary understanding. The same remark applies to the answer to

that demand or complaint, and to all the other proceedings in the cause. When the parties made counter statements, those statements should be brought before the public officer by the parties themselves, or their agents, and he, if the question was one of law, that is, if admitting the facts stated on one side, the opposite party denied that they formed a sufficient cause of action, or a sufficient defence, should reserve the question for the Court above, and if the facts asserted on one side were denied on the other, should prepare a formula or issue for the jury. This is precisely what our pleadings now pretend to accomplish, and it is for the advocates of the present system to show, how the uncouth forms by which the facts stated, are disguised, how the endless repetition spreading over sheets of foolscap, how the ridiculous phrases borrowed from the obsolete vocabulary of barbarians contribute to that object.—Why it is for the benefit of the parties that errors of form, and inadequate allegations instead of being altered without expense to the parties in a preliminary stage of the proceedings, should be reserved to the moment when amendment is impossible, and when the party, misled by the craft of his antagonist, finds the ground cut away from beneath his feet, and himself stripped of his rights without the possibility of reparation or redress. This would be bad enough in all cases, but when the barbarous jargon to which our Courts have wedded themselves, especially when multiplied at a certain rate, really renders it difficult for those most deeply versed in its mysteries, to say what is positively meant to be

asserted, or what to be denied; when facts that two farmers from the plough would make intelligible in ten minutes to the least acute of mankind, (and that after all twelve farmers from the plough are generally to decide upon,) are stated in a way so obscure, so technical, clogged with so many circumlocutions, protracted to such immeasurable length, that the Judge who tries the cause has an abstract, as it is called, of the pleadings regularly prepared for him, and where, in spite of all this, it often happens that he misdirects the jury as to the very facts which are for their consideration; and in consequence, (if neither of the parties commit suicide,) the whole cause is to be tried over again, and the whole record, with all its useless labour and wanton expense, is so much waste paper.—It is strange, in spite of all the Marryatts, and the Gibbs, and the Woods, the Mingays, and the Scotts, that ever assisted in the litigation of their species,—it is strange to hear a system, so curiously contrived to torment and irritate, and harass and perplex, and reduce to beggary, defended on the ground of its bringing its victims to a short and simple issue.

Instead of patching up a system which is incorrigible, would it not be well for the sages of the law to determine upon another, founded upon those principles of equity which were as unknown as the Copernican system was, even to the most virtuous inhabitants of this island, at the time when the Norman pettifoggers by no means remarkable in their own day for virtue or for wisdom, flourished, to whom we are indebted for the forms of action, the rules of pleading,

and the elaborate machinery for obstructing justice which continues to prevail among us. In spite of every respect for the present Judges, and for most of those who were on the Bench at the time when Lord Grey came into power, I must say that more deplorable proofs of legislative incapacity and of complete ignorance of all that Jurists ought to know, were never exhibited than in some of the measures adopted by those entrusted with the task of common law reform on that occasion. Conceived in the narrowest spirit, beset by the most sterile details, without a glance towards general improvement, the changes made, were exactly those which a lawyer of Edward the Third's time, whose knowledge of jurisprudence was derived from the grand *Coutúmier*, and whose philosophy was taken from a schoolman, would have hailed with rapture. If I wanted to give an idea of the baneful effect produced on vigorous minds, by the study of English law, I would show a stranger the new rules, and tell him, those were the improvements which the correctors of a system, swarming with the most frightful and admitted evils, had, after half a century of desperate resistance, at last persuaded themselves to tolerate.

The system which existed during the flourishing period of Roman jurisprudence, from the time of Cicero to that of Diocletian, and which was established Lex Æbutia(*a*) and the Leges Julia, would, with a very slight alteration, answer every purpose of the present

(*a*) A. U. C., 577, or 583.

age. According to that system, the magistrates heard the case of both parties, and then determined whether or not, supposing the facts alleged by either were true, the plaintiff had a sufficient ground of action, or the defendant an adequate defence. Now, in the Roman system, every magistrate was, in his own province, absolute — there was no appeal from his decision. When his year of office was over, he might be impeached before the people of corruption; and, if found guilty, he was sometimes put in the situation of the party whom he had transgressed the rule of equity to favour. Therefore, if the opinion of the magistrate was inflexible against either of the parties, the case of that party was, during the period of his office, at an end. (With us a question of law—supposing the facts agreed upon, would be prepared and submitted to the Court above)—if relevant facts were disputed, those asserted by one party and denied by the other, were carefully stated and submitted to a jury (*a*). It seems, indeed, if the principle of trial by jury be once adopted, that is, the appointment of judges, in fact, who are not lawyers, but simply citizens, that the preparation by "*judicial authority*," of the statement which they are to decide upon, ought to follow as a consequence. In Rome, accordingly, where the jury decided, we find that the preparation of the *formulæ*, or the mould in which the facts were cast, before they were submitted to the consideration of a jury, was precisely the portion of Roman

(*a*) Puchta., Vol. 1, s. 80; Vol. 2, 100.

jurisprudence which the greatest lawyers were employed, *not by the suitors*, but by the magistrates to prepare and ascertain (*a*).

Formulæ of fact and law were drawn up for each particular exigency. The form required by the plaintiff was discussed, examined, and settled in the presence of his antagonist, by the magistrate. When we are told, therefore, that in our zeal for improvement, we wish to bring matters back to the state when pleadings were carried on "*ore tenus*." It might just as well be objected to our system that it supposes the necessity of parties to a suit, making use of their tongues and hands as they did before empires were founded, or society could be said to exist. The late measures in free trade are certainly much more akin to an earlier state of things than to the cumbrous and artificial principles which, as society advanced, became predominant. But the main point of what we purpose is totally lost sight of by these objectors, namely—that it should be impossible for any party to make a technical error in the preliminary part of the proceedings which should deprive him of his right. It was for this particular purpose, namely, to arrange and mould (*b*) the facts in dispute between the parties so as to prevent either side from being surprised by the other, and to submit the points in an intelligible shape to the jury or Judge who were to decide upon them, that the judicial functions of the prætor among the Romans, and of

(*a*) Val. Max. L. 8, § 12. (*b*) Puchta., Vol. 2, p. 100.

the *Juge d'instruction*, under the code of Frederic the Great, were especially confined—the *Juge d'instruction* heard the statement of the parties, and drew up a *procès* verbal of their declarations. So in Rome, this was the first interference of the magistrates which, with us, is altogether put aside. This was the most important part of the magistrate's duty under the Roman system, and with this the Judge has no concern whatever under our own. It was neglect and corruption in the performance of this duty that constitutes one of Cicero's most serious charges against Verres. After the *vocatio in jus*, the magistrate defined the question which the jury, or sometimes a single Judge had to determine. It was to this admirable system worthy of a great and really practical people, that the old system of the "*legis actiones*" in which a slip of the pleader was fatal to his cause, and which closely resembled (except that it was rather less absurd and barbarous) our special pleading, gave way, as with the extension of empire and intercourse, and the exigencies of society, the views of the *Roman* jurists became more expanded and their method more luminous. The skill with which the formulæ were prepared was appealed to by the Romans as the criterion of legal science. But to make the form of these preliminary proceedings essential, to make property and character depend upon it, to make it unintelligible to the parties, and then to leave it (without any judicial aid or interference, till aid and interference are too late) to an advocate whose mistakes in many instances such as no human foresight

could avoid, in numberless others, as we know from our law books, such as the most crafty and subtle pleaders have committed, do commit, and will continue to commit, are ruinous to his client, is a complication of injustice and absurdity, of cruelty, and folly worthy of Caligula (*a*), and certainly peculiar in the present age to this country. It would be endured in no other free, and civilized nation, nor is any complete parallel to it to be found in any scheme that has ever existed in any country with which history has made us acquainted. I add examples of the Roman *formulæ in jus* and of the *formulæ in factum*, and I would ask any one in whose mind every ray of reason is not quenched by prejudice, to compare them with the pleadings in Saunders' Reports, or as they exist at present among us.

"Formula *in jus concepta:* Judex esto. *Demonstratio:* Quod Aulus Agerius apud Numerium Negidium mensam argenteam deposuit, qua de re agitur. *Intentio:* Quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona ejus. *Condemnatio:* Id judex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

"Formula *in factum concepta:* Judex esto. *Demonstratio et intentio* blended: Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse, eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse. *Condemnatio:* Quanti ea

(*a*) Caligula wrote his laws in very small characters, and posted them up as high as possible.

res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemnato; si non paret, absolvito."

It is unjust to deprive a man of his claim, when you know that he is right, because he cannot word his own demand in a manner you approve of. But it is the height of all injustice, it is pedantry sublimed to fanaticism, and worthy of Lord Coke, to insist upon the demand or defence being worded in a manner so technical, that the ablest and most experienced practitioners are frequently at a loss to settle it, and then to punish the man who employs these practitioners for their mistake in the use of the jargon you have adopted. If you think the demand not worded with sufficient accuracy,—send for the plaintiff, make him explain what is meant, and word the demand yourself in such a manner as will be intelligible to any man of common sense. Such would be the dictate of natural justice; such was the proceeding before the Roman Prætor. But let the suitor state his demand in a way never so intelligible, you punish him if he does not use forms which it is impossible he should know any thing about, which it is equally impossible his adversary, or the jury who are to decide between them should understand, and which, to make the absurdity complete, you, yourself the Judge, insist upon having presented to you in a simpler and less technical shape. The original intention of all pleading is, to give information to the parties respectively of the claim made by one and the defence set up by the other, and you punish them, not because the information is not clear, but because it is not conveyed in

a form in use among the lawyers of the Plantagenets. The original purpose is lost sight of altogether; and the power of wielding a technical jargon with dexterity is of more consequence than the most unquestionable right.

But the absurdity of this defence of special pleading, on the ground of its bringing litigants to an issue, will appear still more manifest if we consider the matter in a different point of view. It is stated that by the system of special pleading the real matters in dispute between the parties are brought to an issue. Any one would suppose that this defence meant, that the matter in dispute was evolved by a concise, logical, and necessary process. Now let the reader try the merit of special pleading by this test.

The statement of the plaintiff is termed a declaration.

The defendant's answer is termed a plea.

The plaintiff's reply to that answer is termed a replication.

Now observe the coarse, clumsy, preposterous, and most unjust contrivance by which matters in dispute are brought to a point at all.

The defendant in his plea may state any number of defences to the plaintiff's demand, he is quite unlimited.

To every one of these defences the plaintiff may have a variety of answers in his turn. But in his replication he is confined to one (*a*)—he is literally

(*a*) "On the subject of several pleas it is to be further observed, that the statute of Anne extends to the case of pleas *only*, and not to *replications* or *subsequent pleadings*. These remain subject to the full operation

obliged to waive every other answer but one, and to rely upon that exclusively. Nay more, for the purposes of this cause the plaintiff admits every fact which he does not deny, and this is the way in which matters are brought to an issue by English law, and this is the perfection of logic, which furnishes so copious a theme for the admiration of pleaders. The plaintiff may have twenty reasons which would prove any one of the defendant's pleas to be false, and the law obliges him to select one, and if from accident or the treachery of a witness he is defeated upon that one, though all the others may exist, he is deprived of all advantage from them, and stripped of his undoubted right. Thus it is that extremes meet,—in order to obtain the object proposed by special plead-

of the common law against duplicity; so that, though to each plea there may (as already stated) be a separate replication, yet there cannot be offered to the same plea, and in reference to the same matter of claim or complaint, more than a single replication." * * *

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"The effect, however, of this state of law is *somewhat remarkable;* for example, it empowers a defendant to plead to a declaration in assumpsit for goods sold and delivered, 1. Non assumpsit; 2. That the cause of action did not accrue within six years; 3. That he was an infant at the time of the contract. On the first plea the plaintiff has only to join issue; but with respect to each of the two last he may have several answers to give. The case may be such as to afford either of these replications to the Statute of Limitations, viz., that the cause of action *did* accrue within six years, or that, at the time the cause of action accrued, he was *beyond* sea, and that he commenced his suit within six years after his return. So to the plea of infancy, he may have ground for replying either that the defendant was *not* an infant, or that the goods for which the action is brought were *necessaries* suitable to the defendant's condition in life. Yet, though the defendant had the advantage of his three pleas cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to *each plea.*"—*Stephen's Pleading*, p. 310.

ing, the English lawyer with all the prolixity, confusion, and delay which he defends on the ground of ultimately securing justice, has recourse to means which would shock a Turkish cadi. The law actually shuts the mouth of a party wishing to complain, and, not content with that, allows the adversary to insist upon the silence of the party whose mouth is so shut, as a proof that he had nothing to say if it had been opened. I do not exaggerate when I say that in no other civilized country but those governed by English law is a man compelled in a Court of Justice to abandon a legitimate ground of enforcing his claim by the law itself, *à priori*, and to admit in favour of his antagonist the direct reverse to be true of that which he could prove, (*a*) and which the law forbids him to establish. Where would be the merit of a system, though never so compendious, which had recourse to so barbarous and inartificial a method as this. If you refuse to hear what people have to say, no wonder if you decide speedily. But when we purchase such injustice at the price of chicane, prolixity and delay, which would make the fullest justice in the eyes of many worthless; when we see such pedantic subtlety, combined with so gross an outrage on the first principles of natural right, does not every other feeling merge

(*a*) See *Bourge* v. *Stewart*, 7 Man. & Gr. 746, for an instance; the decision was, that the replication was bad for duplicity, as either of the facts stated by the plaintiff in it, would have been an answer to defendant's plea; therefore, because the plaintiff had two satisfactory answers to the defendant instead of one, the defendant triumphed! and we call ourselves a practical people! So *Macleod* v. *Schultze*, 3 Dowl. & Lowndes.

in amazement, that among any people calling themselves free, and possessing a representative government, such an abomination should have been tolerated so long and be still defended so pertinaciously. Indeed, so shocking is this rule, that in a particular class of cases an attempt has been made to evade it; and by a replication called *de injuriâ* several facts may be put in issue at once, according to the approved and inveterate habit of England to apply a partial and feeble remedy to a consuming and universal evil. However, even this partial remedy, limited as it is, has given rise to so much doubt, and is so uncertain in its application, that the most able pleaders are often uncertain when and how to use it. (*a*) Such chicane

(*a*) There are six cases last year reported on the replication *de injuriâ*, in three it was held bad, and in three it was held good!

I extract the following passage from Mr. Tyrwhitt's very useful and able work on pleading. The reader must judge of the litigation which such a system promotes, page 595 :—

"There is a nicety and difficulty, where several facts are pleaded, in saying, whether they constitute one "*point* or ground of defence" or not? The question depends not on the grammatical construction of the language used, but on the substance of the pleadings. A point of defence is clearly not to be confounded with the whole defence contained in the plea, otherwise there would be no distinction as to the cases in which a general traverse *de injuriâ* is allowable, and upon which nice questions have arisen, and a plaintiff might in all cases deny the whole plea, though it consisted not of mere matter of excuse only, but of *title* or *authority* derived from the plaintiff. This cannot be. A plea may indeed comprise a single point of defence only, but it may also comprise several.

A replication which traverses two or more allegations of facts not leading to one point of defence, taking two or more issues, *either* of which would meet the whole, is bad for duplicity, but only on *special* demurrer. The error is cured by verdict. No deviation from this principle is sanctioned by the new rules, or by any statute, except in the case of a plaintiff in replevin, whose plea in bar, though in the nature of the replication in other actions, need not be single, but may, by leave of the

has not even the merit of sophistry—it is downright impudence—it is a reliance on the stockish reluctance to change, and the servile deference to authority peculiar to this free country, which the result has hitherto justified, but which I yet hope experience will show may, in some instances, at least, be carried a little too far.

In order to give a taste of these absurdities, I will mention a few entirely recent cases (*a*), first, there is the case of *Frances* v. *Dodsworth*, decided last Term in the Common Pleas. The Judges took time to consider their opinion. The case was this:

The plaintiff said the defendant owed him money for goods. The defendant said, it was true he had received the goods—but that the plaintiff owed him, the defendant, a sum equal in amount to the sum demanded by the plaintiff.

The plaintiff gave a satisfactory reason why the claim of the defendant was unfounded.

The defendant took a formal objection.

Court, contain "as many *several matters*" as "he shall think necessary for his defence." In no other action can a subject reply double, but the King, by his prerogative, may traverse every fact contained in a plea."

(*a*) If the reader wishes for specimens of absurdity during the last year, let him refer to *Smith* v. *Shultze*, 15 L. J., N. S. 230; *Dresser* v. *Stansfield*, 14 M. & W. 22; *Webb* v. *Cowdell*, 14 M. & W. 21; *Esdaile* v. *Maclean*, 15 M. & W. 277; *Levy* v. *Webb*, 15 L. J. 407; *Holford* v. *Bailey* is still more absurd than I had supposed, L. J., Feb. 1846, 660. It was there held, that a "sole and exclusive" fishery did not mean a several fishery, year of Lord, 1847, the consequence of which is, that the plaintiff has proved his right in vain, and that the prodigious expense incurred by him, probably far exceeding 1000*l.*, has been flung away. The pleadings which gave rise to the objection, were drawn by the best pleader of his day—now on the bench.—*O genus Anglorum! servum pecus!*

The Court of Common Pleas held that the demand of the plaintiff was substantially just, and that the defendant had no claim against the plaintiff, yet they gave judgment against the plaintiff (justice) and in favour of the defendant (injustice) on account of the informality.

Again, take the case of *Fries* and *Littlewood.*

The defendant was literally without any shadow of substantial defence. The case is brought before a jury. The jury finds in favour of the plaintiff, and gave him fifty pounds damages.

A point entirely technical, and quite beside the merits of the case, is seized upon by the ingenuity of the defendant's counsel—a motion is made in the Court above to nonsuit the plaintiff.

The plaintiff is nonsuited.

The plaintiff goes to trial again, he gets a verdict for 100*l.*, a verdict is taken generally for the plaintiff on all the issues. But one of these issues is immaterial, that is, in addition to the issues which really touch the merits of the cause which he has proved to the satisfaction of the jury; there is one issue, which does not, and this issue, when he took his verdict, the plaintiff did not exclude. It was a merely formal proceeding with which the jury had nothing in reality to do—the plaintiff might have confined his verdict to any issue he thought proper without any opposition from the defendant. The point of form was seized upon—another application to the Court above. Another nonsuit. The case, unless Mr. Fries is satisfied with this specimen of British justice, will

now be tried a third time—and, let it be borne in mind, that, with these objections which have twice deprived the plaintiff of the fruits of his verdict, and entail upon him such frightful expense the full complete—unanswered, and unanswerable justice of the plaintiff's demand is perfectly consistent. Mr. Fries is, I learn, an opulent man. But, imagine a poor man dependant perhaps for the means of pursuing his industry, of supporting his family, of meeting his engagements, or the payment of a just debt, thus, baffled in his attempts to obtain an unquestionable right—tormented, exasperated, harassed, agonized, driven to despair by such merciless litigation—reduced to beggary by success itself; and say, if a more tremendous instrument of torture than such a system of law could be forged by the worst enemy of the human race.

We may magnify our Judges as we please. They may sit in silk attire, or in garments resembling in hue those for which the lady of Babylon seems to have had so decided a predilection. They may cover their heads with the tails of quadrupeds. Trumpeters may blow before them in the streets, and squires in grotesque habiliments sit near them on the bench. Chaplains may be provided at the sheriff's expence, to refresh them with a certain amount of sleep before their labours. They may be surrounded by clerks, criers, and javelinmen. They may dine with lord lieutenants, and take precedence of dukes. They may hear arguments of eight or nine hours' length, in piebald English on points of less importance than the scholastic question "*utrum chimæra bombinans in vacuo*

possit comedere secundas intentiones." They may amaze grand jurors by their wisdom, and convulse petty jurors by their wit, all this awful, sublime, imposing, as it is, gratifying to the heart of man—and intimately connected as it is, and interwoven with the stamina of the British constitution—is but "the trappings and the suit," not the essence and reality of justice. When, from some ridiculous subtlety, some notion worthy of the Plantagenets, some invention of my Lord Coke, or some doctrine of Saunders, some quibble below the very aldermen that digest—a poor man is ruined—a woman outraged with impunity, an oppressor triumphs, and a miscreant is let loose to rob, assault, ravish, or murder his fellow creatures as the case may be.—I know not if any quantity of horsehair on the head, or breadth of ermine on the back, any gravity of demeanor, or splendour of equipage, can atone for the injury thus inflicted on society. "*Ce n'est pas tout d'être rôti, il faut être poli,*" said a witty writer, speaking of some virulent fanatic.

It is not every thing to have the royal arms on the wall of a Court of Justice, and its table covered with parchment, or even to call the Judge my lord, though in England it is a great deal; something more is requisite—as it is, many of our countrymen respect the law as a savage worships the devil—not because he loves it—but that it may do him no hurt.

The case of *Jones* v. *Jones*, decided in the Court of Exchequer, carries absurdity to a height at which Gaudy himself might have exclaimed, "Ohe! jam!"

The plaintiff complained that the defendant had broken into, and trespassed upon his close.

The defendant said that the close was the soil and freehold of A. B., and that the entry and trespass upon it by him, defendant, were by A. B.'s authority.

The plaintiff replied that the defendant did not enter by A. B.'s authority.

The case is taken to a jury. The jury find for the plaintiff, and that the defence is untrue; meanwhile it is argued in the Court of Exchequer, that defendant ought to succeed, because the plaintiff's reply is a "negative pregnant," the principal authority being a case decided in James the First's time, and the objection,—that the reply is *pregnant with an admission!* This conceit, however, was in danger of becoming obsolete, and but for the Court of Exchequer might, to the unspeakable damage of English suitors, have been forgotten altogether; for, says Mr. Stephens, "The rule against a negative pregnant appears, in modern times, to have received no very strict construction, for many cases have occurred in which, upon various grounds, that form of expression has been held free from objection," p. 421. However the Court of Exchequer upheld this most technical of all technical objections. The plaintiff, though he had a verdict in his favour, was completely defeated on this ground only, and he has learnt, to his cost probably of three or four hundred pounds, besides losing the right which the jury found was his, how dangerous it is to rely on authorities subsequent to James the First's time, though one of those authorities was in the Court of

Exchequer, 7 M. & W., 512, and how utterly useless reason and justice, fact and law are, when opposed by a "negative pregnant."

In the number of the *Law Journal* for February, 1847, there are two decisions in the Court of Exchequer, which might have been decided in the days of Edward the Third.—In one of these cases, the victim was called Thurlow—in the other Muggeridge.

The first is *Rawlins* v. *Muggeridge*, page 38, and in that it was decided by one of the best lawyers, and certainly one of the ablest men in England, that because the defendant said "that the plaintiff ought not to maintain his action," instead of saying that he ought not *further* to maintain his action, that the defendant's plea was bad. It should be observed that the conclusion of the defendant's plea was, "Wherefore the defendant prays judgment if the plaintiff ought *further* to maintain his action," so that the mysterious word *further* was used in the plea. But, as Baron Alderson pathetically said, "How can a defect of this sort be remedied, when it is pointed out on special demurrer?" If it had been on general demurrer, reason might have had some chance—as it was, the bare idea would be extravagant—so that because the word further was omitted in one part of a plea, though the omission in no degree affected the sense, in no degree misled the adversary, or assisted the defendant, the party whose pleader omitted it, was obliged to give up his cause altogether, or to pay a sum of some thirty pounds. How gratifying it must be for a "practical people" to think of such a

decision as this, how clearly it illustrates the evils of speculation. For had not all theory been so carefully banished from the minds of our lawyers and legislators, had there been left a cranny or nook through which philosophy, or an idea of abstract justice could have found its way to illuminate the dark heap of rubbish which so many practical lawyers have accumulated—the country might have lost the practical benefit of such a practical decision. Baron Alderson's question, in all its touching simplicity, might never have been put, or, if put, might have been answered, and the word "further" have been left out in a plea where, theoretically speaking, its use was quite indifferent, without entailing the loss of perhaps a quarter of a year's salary on its enemy. What is to become of the case I know not, or whether the defendant means to go "farther," if he does, I think my readers will agree with me that he can hardly "fare worse."

The next case was *Brown* v. *Thurlow*, in the same part of the Law Journal, Feb. 1847, page 41, and here the crime was irreparable, it was not one of omission but of commission. The triumph of practice over theory was complete. The plaintiff accused the defendant of slander, whereby the plaintiff lost his trade and business to his damage of —— hundred pounds. This the defendant did not deny. But he accused the plaintiff of a much more serious crime, a crime which made him, *pro tanto*, an outlaw, and entirely disabled him from receiving any redress for the damage he had sustained—a crime which closed the ear and paralysed the hand of justice, and at

once made the scale of the adversary kick the beam. This was the insertion of the word "whereas" in the beginning of his complaint — it began, "for that WHEREAS the defendant contriving, and wickedly intending to injure the plaintiff did so and so," instead of saying, "for that the defendant, did so and so;" here again there was a special demurrer. Had it been a general demurrer as before, there might be some hopes for the plaintiff; his wrongs might have been entitled to some consideration from the justice of his country. But a special demurrer, it is like the "*sans dot*" of Harpagon, an answer to every argument derived from justice or experience. To think of right or wrong when a special demurrer is in the way. To suppose that what might be overlooked on a general, should be disregarded as a special demurrer. Shades of Eldon, and of Saunders and Coke, forbid! A special demurrer is, to a multitude of rights, what charity is to a multitude of sins. Accordingly the Chief Baron says, "the defect being pointed out on special demurrer, the defendant is entitled to judgment." Mr. Baron Parke says, "If this declaration had been upheld by a long course of precedents," &c. as Jortin said, those who believed in the miracle of the thundering legion, were fit to believe in the miracle of Constantine's cross, and *vice versâ*, so it may be said that the law which ruins a man because his pleader omits the word "further" is consistent when it visits the insertion of the word "whereas," with the same penalty. If a man wanted to turn the whole proceedings of a Court of Justice into ridi-

cule, could he invent any cases more appropriate than those I have cited, and which have been decided upon by our ablest Judges?

I had thought to have ended my collection of injustice and absurdities wrought by special pleading with the instances cited above, but there is in the thirteenth volume of *Meeson* and *Wellsby*, p. 826, one instance of such hideous deformity—such a "superior fiend"—such an exemplification of our Manichæan system, that I cannot help adding it to the catalogue. As the proprietor of a Lama in the early part of the century wrote over the door of the place where the Lama was exhibited—"allowed by Sir Joseph Banks to be a real quadruped." So I do not despair of seeing annexed to the marginal note in this case allowed by Mr. Baron —— or Mr. Justice —— to be a real grievance.

The case is this—

James v. *Williams*, 13 M. & W., p. 828.

I beg the reader will observe, that I do not mean to blame the plaintiff or to assert on which side the right really was in this case, my object being merely to show, what may be done by English law, and what the state employs its authority and resources to uphold.

James complains that Williams owes him money on a bill of exchange of 100*l.*, which Williams had accepted.

Williams says, "I did accept it, but you, the plaintiff, received bills of exchange amounting to 380*l.* as a payment for the bill and compensation for the delay in *settling it*; and (mark this) these bills of exchange

were paid when due, and before you began this unrighteous action against me." "No!" replies James, "the bills of exchange were not paid." This point is referred to a jury, who find, on the issue for the defendant, *i. e.*, that the 380*l.* due on the bills had been paid to the plaintiff. Such was the state of things when counsel for the plaintiff applied to the Court of Exchequer to put the plaintiff in the same situation as if the jury had found that the bills had not been paid; and that he had never received a farthing—in other words, to enter a verdict for plaintiff in spite of the verdict. To this application the Court on an exclusively technical ground was obliged to accede. The plaintiff (for ought the law has done, or that the report tells us) has therefore received 380*l.* which his advocate does not dispute, was paid and is entitled to the 100*l.* over and above in payment for which the 380*l.* was given from the defendant, besides costs; and this horrible oppression, this scandalous defiance, not of justice only, but of decency, is the necessary result of English law. Had the sum at stake been thousands, the result would have been the same. The amount of the sum can, of course, make no difference in the application of a principle. Such is the jeopardy —such is the possibility of ruin, to which, as matters stand, every one is exposed in our Courts of Justice.

Observe the monstrous wickedness and iniquity of the whole proceeding. Had the plaintiff demurred to the plea as insufficient, it might have been amended, at an enormous expense, it is true, but amended it might have been. He secures, however, a double chance. He first takes his chance of bewildering or

misleading, or tempting to perjure themselves, that chosen instrument of all imaginable injustice, a Welsh jury. When even that (for some reason probably in no way connected with the merits of the case) fails him, he goes to the Court above, and the language which the law allows him to employ is this—"True it is, my demand was impudent and oppressive, but a slip has been made, and I call upon you, therefore, as instruments of the law, to compel the defendant, in addition to the payment I have received from him, not to try the case again," which one would think might satisfy the most insatiable craving for injustice that ever animated a Judge in the days of the Stuarts, civil or ecclesiastical—no—but to do what he would have been forced to do had the jury found an opposite verdict, "and to pay me over again that demand which after the verdict of the jury, I cannot deny was shocking to justice, but which such is the wisdom of the English law, I have a right to be paid twice over," and this demand, English judges, while their cheeks are purple with blushes and their foreheads bend to the earth with shame, are compelled to grant. Is there in the language of invective a single epithet too strong to characterize a system which makes so detestable a proceeding law, and is it in the tongue or pen of man to exaggerate its evil.

> Nonne foret satius tristes Amaryllidos iras
> Atque injusta pati fastidia? nonne Menalcam?

Were Laud and the Star-chamber more abominable? Would it not be better to go to Russia? or even to a Parliamentary Committee for a decision? than to a

tribunal composed of Archangels and fettered by such rules as these; which put the defendant to the expense of proving himself in the right, allow that he is so, and then, with the utmost gravity, decide in favour of his antagonist.

What signifies it though a race of Daniels come to judgment, if they are forced, under the alternative of perjury, to pronounce such decisions as these. The suitor would scarcely fare worse if, as in the case of Daniel, he had to take his chance of justice in the lions' den.

But there is a still stronger argument, a still more decisive authority against special pleading, and that argument, and that authority, will be found among the champions of special pleading themselves.

"Via prima salutis
"Quâ minime reris, Graiâ pandetur ab urbe."

The very men who made the rules of special pleading narrower and more ludicrous, more like the system invented by the philosophers and jurists of Edward the Third's time, where *personal* property is concerned, recommend its total abolition where *land* is at stake! Would not one suppose that we were living in the days of the Heptarchy, when funds, and bills of exchange, and railway shares were unknown, and when land was everything? To make the following passage intelligible, I must inform my readers, who may not be lawyers, that "ejectment" is the term which the semi-barbarous pettifoggers, who legislated for slaves and tyrants in the fourteenth century, invented to describe a way of recovering land, under a fiction, of *course, of the coarsest* and most stupid description, and

that to it, of course, name and thing, we still tenaciously adhere; in short, that an action of ejectment means now an action brought to recover land, as distinct from personal estate. The Commissioners for the Reform of the Common Law dissuade special pleading where land is at stake, for, say they with great truth,—

"The question, whether any particular statement of the title relied on should be set forth in the declaration, with a view to narrow, by pleading, the questions to be tried, has occupied much of our thoughts. After full consideration of the subject, we think that the difficulties in which parties would often be involved by the necessity of stating title upon the record, and the *failures which mistakes must occasion*, would *not* be compensated by the advantages to be expected from bringing the issues to be tried within narrower limits.

"If instruments are pleaded according to their supposed legal effect, *an error in construction would be fatal to the cause;* and we do not think that the danger to be apprehended from variance in the description of legal estates, when occurring in actions for the trial of title, could be obviated by the means which we propose hereafter to recommend with reference to such variances as may occur in ordinary personal actions. If, to avoid the consequences of variance, it should be thought expedient either to introduce a variety of counts, or to set forth in a single count the tenor of every instrument the legal effect of which might admit of doubt, the record

would often be extended to a very inconvenient length; and wherever title was derived from a will, the construction of which was dubious, it would be requisite that the whole should be set forth upon the record, since it is from the entire will that the intention of a testator is to be collected, and the effect of his dispositions ascertained.

"It is therefore proposed, that in a plea of land the plaintiff may allege, generally, that he is entitled to the possession" (*a*).

To this document are annexed the names: Bosanquet; Stephen; Alderson; Patteson.

To which I will only add, that what is done where land, may be done where money is at stake, and that the man who loses hundreds of pounds by a slip in pleading, has just as much reason to complain as a man who loses a hovel on a waste. Can a more melancholy proof of the force of habit in warping the most acute minds be imagined, than this recommendation with regard to ejectment, based on such solid reasons, coupled with the return to barbarism on principles directly opposite, though the same reasons are applicable, because one form of action is called Assumpsit, and the other Ejectment, and because money is sought to be recovered in the first, and money's worth in the second.

Lives there any one who will gravely assert, that it is desirable for substantial justice to be on one side, and the decision of a Court of Justice on the other? and that this should happen not once, not twice, not

(*a*) Second Report of Commissioners on Courts of Common Law, p. 14.

occasionally in a long series of years, but repeatedly, systematically, in consequence of principles deliberately asserted, and openly acted upon, so constantly, that out of twenty cases brought before the Court in banc, as it is called, not one-half are decided on points in any way connected with the merits of the question, and to take a narrower view, and one I am almost ashamed to mention, lives there any man so heartless, so indifferent to the public good, or even so short-sighted as to think such a state of things, I do not say beneficial to the public, but favourable to the character of the Bar, to the esteem in which they ought to be held by society as men of enlarged thought and liberal attainments, or even to their pecuniary interests. If there be such a man I may indeed guess what books he has read—what associates he has lived with—what share of magnanimity has fallen to his lot, but it is not for such a man that I would be supposed to write, or such a man that it is at all my purpose to convince. I doubt, however, if any man will be found daring enough publicly to hazard such an assertion, and I therefore infer as a corollary from what I have stated, that nothing can be more mischievous, more selfish, more unworthy even of an ordinary mind, than to establish as a means of discovering truth a system which, in the great majority of cases, puts truth altogether on one side, and not only that, but makes it impossible for a Judge, without perjury, to take the truth at all into his consideration. All idea of order—all idea of good sense—all the purposes for which society is instituted—all that we gain by study

—all that is obtruded on our senses by experience—all that Nature herself has written in the hearts of her rudest pupils, is violated by a system so malignant and so absurd—so powerful for the support of evil, and so impotent in the defence of right.

Another disgraceful abuse that still prevails among us, is the payment of officers in the Courts of Justices by fees, and the collection of fees from suitors on different pretexts. The officers ought to be paid like the Judges, by a salary from the state. To say that this would be making those who are not suitors pay for those who are is downright nonsense—justice is one of the great original purposes of society. The man who does not go to law has just as great an interest that it should be cheap and attainable as the man who does. If he sleeps in security and receives his debts, it is because they who are attacked at night by ruffians, and whose debtors refuse to pay what is due, can obtain redress from the powers established by the community.

Though in my opinion the appeal to juries in most civil cases is attended with very serious evils, yet I am not sanguine enough to expect that a system which has struck such deep root among us will soon be extirpated; but the barbarous conceit of insisting upon their unanimity, and shutting them up till they agree, whether in civil or criminal cases, is an absurdity which we may reasonably expect to see abolished. Nothing can tend more directly to the encouragement of perjury, and to the impunity of crime. If the opinion of the majority in civil cases, and

of three-fourths in criminal cases, were to decide, all the purposes which it is sought to ensure by the present most ridiculous practice might be attained, and the notorious evils to which it gives rise would in great measure be avoided.

Another genuine remnant of feudal barbarity, and a striking instance of the manner in which substance is sacrificed to form in our system, from beginning to end—from the double summons of the jurors, to the tribunal which is the last hope of baffled reason or of disappointed chicane, is the supreme appellate jurisdiction of the House of Lords. To establish a body of Judges on abstruse points of law, ninety-five out of every hundred of whom would, by the exercise of the privilege entrusted to them by the constitution, commit a great offence against justice, offer as violent an outrage as well could be offered to public opinion, and expose themselves to every sort of imputation, is another absurdity peculiar to this country. Here, again, may be traced that blind unreasoning attachment to a barbarous antiquity, which is the origin of so many of the evils that exist among us. Why are Lord Twoshoes, or the Bishop of Barataria, to listen to the arguments on a case of real property, or on a point of pleading to them incomprehensible, as well as Lord Cottenham in the House of Lords, when nothing but the most insane presumption could tempt them to interfere in the decision which Lord Cottenham will pronounce? Even in the very rare instances where a peerage is the reward of merit, does storming a fortress qualify a man for applying the rule in Shelly's case?

or sinking an enemy's fleet make an admiral a special pleader? But in the more common cases when a squire is made a peer, or a chaplain who has been tutor in some great family, a bishop, do they then become less hopelessly ignorant of all that an English lawyer has devoted days and nights of incessant labour to gain some knowledge of? Would they not be forced to make Warwick's answer in Henry VI., if appealed to on a point of law? If so, why give them the power of deciding such points? and if you say they will never exercise that power, can any folly be grosser or more palpable than to make a man a Judge, it being at the same time perfectly well understood that nothing but corruption or insanity can induce him to fulfil his trust. But the House of Lords is assisted by the Judges, as if those among the lords who are not lawyers could follow their reasoning or understand their arguments. And observe by this wise scheme while you crowd your tribunal with these mock Judges, you exclude from it men the most admirably qualified from habit, learning, and ability, to determine those questions of law so difficult as to be reserved for the last Court of Appeal. Mr. Pemberton Legh, for instance, is not a member of your High Court of Appeal, and the Archbishop of Canterbury is, you have in it none of the three Vice Chancellors, and only one Chief Justice, but as a compensation you have several college tutors, courtiers, and colonels of hussars. Now could any remedy be more easy than to make the last Court of Appeal consist of all the lords and privy councillors who hold, or have

held, the high judicial stations, or the offices of Attorney and Solicitor General, or who have been made peers or privy councillors within a year after they had ceased to practice at the Bar, and at the same time to appoint two Judges of the Privy Council. I must add, that I do not mean any of the observations I have made to apply to cases of impeachment. For that case, all things considered, I think the House of Lords the best tribunal.

To these anomalies, however, must be added another hardly less shocking, I mean that of allowing the Lord President of the Council, when not a lawyer, to sit as Judge. How is it possible, if legal studies are of any use in enabling people to decide on legal questions, that he should know which way he ought to decide? If, instead of a lay Lord President the Privy Council sent for a physician, or a squire, every body would cry out at the absurdity. But because the lay Judge is a Privy Councillor and perhaps a peer, it is thought proper and reasonable. Well might Malebranche say, "that an opinion which is treated with contempt if uttered by a man on foot, is received when it proceeds from a man in a coach and six with the utmost deference and attention." If he had lived in England in the days of railway contractors, and attended Parliamentary Committees, he would have found ample reason to corroborate an opinion so unfavourable to human nature.

With regard to criminal pleading, it also should be abolished altogether. A copy of the depositions should be furnished to the prisoner; and at the foot of the

depositions should be written: The prisoner is accused of having done what the witness or witnesses so and so describe; and of being the person mentioned by them in their deposition under the name of ———, or whose name they do not mention, but whose conduct they describe. A concise statement of the general facts deposed to by the witnesses, (in some respects like the *acte d'accusation* in France, but less circumstantial,) should be read to the prisoner before his trial, instead of an indictment which, for all the information it gives him, might as well be written in Chinese: and it should end by saying,—therefore you are accused of such an offence. The depositions and this statement, filed and kept by an officer of the Court, would be conclusive evidence in favour of the prisoner if the same charge was ever renewed against him. What hardship would there be in this? What disadvantage would it be to the prisoner? It has been said to me by a person now high in office, and for whose opinion, in common I believe with all who know him, I have great respect; "Forms are useful in bad times:" are they? (*a*) Did they check the wholesale massacres of Jeffreys? Did they save our judicial records from the foul and everlasting infamy, an infamy for a parallel to which we may ransack the pages of French jurisprudence, after the destruction of the Templars in vain, burnt into them by the horrible

(*a*) Injustice takes a thousand shapes—the form changes, but the spirit is universal. It will exist as long as rapacity and ambition exist among men; and it is not by the dead letter of ancient forms that its ravages can be prevented. In those very forms to which it has adapted itself, it will find, as it always has found, its greatest force.

murders of Mrs. Grant, and Lady Alicia Lisle, and Sir Thomas Armstrong. Forms were never more rigid, more pedantic, and never, except for the ruin of innocence, more unavailing. They are, and always will be in such times, the strongholds of oppression, the blinds and masks of tyranny. And what will be their spirit if they were made in bad times?

There is at this moment, lying in the Chambers of a friend of mine, an indictment, which I have seen, of fifty foolscap printed pages (*a*), and it has, as yet, reached only half its intended limits. How can any human being pretend to guard himself against such a contrivance? How can any system be worse than one which renders such a proceeding necessary? Is it for us while such proceedings, at which Raminagrobis might have blushed, are matter of common experience, nay, are possible among us, to blame the French for a system far less oppressive? And setting aside the cruelty, the expense, (two thousand pounds, I understand, is the expected cost of the prosecution,) the disgrace to justice of such proceedings, is not the effect they must have upon the minds of those who study and prepare, who defend and attack, aye, and who decide upon such pitiful nonsense, obvious? Will not superior minds prefer bread and water to palaces and luxury purchased by drudgery, compared with which the occupation of a haberdasher, the jobbing of a railway contractor, or the life of an Austrian courtier, is dignified and instructive? And are they to be blamed and discouraged who, treading in the

(*a*) It has since extended to a thousand folio pages, and measures 20 feet.

steps of far greater men, endeavour, in spite of official apathy, feebly perhaps, perhaps unsuccessfully, but earnestly, ardently, with whatever zeal, ability, or knowledge they possess, with all their heart, and all their soul, and all their strength, to put a stop to such abominations.

The English law is the perfection of reason, therefore, its proceedings are guided by rules, invented at a period when reason was unknown, and justice never thought of; as it always aims at substantial justice, it allows, systematically, the most frivolous quibble to deprive a man of his unquestionable right, as its practitioners have always been remarkable for enlarged views and patriotic sentiments, and, especially, for adopting improvements in harmony with the spirit of the age, they allowed wager of law and trial by battle to form part of the institutions of England during the present century; as its presumptions are always in strict conformity with that practical sense, which is the great boast of our countrymen, it presumes, that every English subject, millions of whom are unable to read, is acquainted with the law, which is contained in about a thousand volumes, and which, the Judges, by a solemn legal form, are frequently said to have misunderstood. As it takes care that no man shall have an advantage over another, not arising from the superior merit of his cause, the expense attending its operations, is so overwhelming, that men of moderate fortunes are frequently ruined by success, and that nothing but actual insanity could make a poor person, in some instances, and those of the highest importance, dream of having recourse to

it; to such a person, for instance, the remedies of divorce, and of protection from brutality after marriage, are absolutely unattainable: as its first object is to protect the character and liberty of the humblest and most defenceless citizens; it entrusts the task of deciding upon them, and applying in cases to them of the deepest interest, the technical rules, which it is the labour of a life to learn, to a body of gentlemen engaged in totally different pursuits, who may never have opened any book at all in their lives. As truth is the main object of its existence, it abounds with the most glaring and useless falsehoods. As it is most beneficent and careful to avoid even the appearance of imposing an unnecessary burden on suitors, it obliges every jury to be summoned twice, the first summons being altogether disregarded, and issued, in fact, at the same time with the second; serving only to put fees into the pocket of some officer, and perhaps to furnish some ground of technical objections. As it is remarkable for equity and plain good sense, (the boast of Englishmen as opposed to the theorists of other countries), it consists in a great measure of decisions, the operation of which is retrospective. Finally, as it is the essence of reason to be consistent with itself, it obliges one Court to decide on principles in diametrical opposition to those which it enforces upon another.

How long shall we obstinately persist in this barbarity?—and what real patriot, by establishing a code among us, will win honour more imperishable, and titles far more glorious than those which it seems the

sole ambition of our "practical" statesmen and lawyers to accumulate.

Before I close these remarks, I wish to notice an article which appeared in the Law Review for February, 1847, and which was devoted to the criticism of my former pamphlet. In spite of the censure on that article, pronounced by one of the most competent judges in Westminster Hall, who termed its author, to him unknown, "a flippant ignoramus," and said, that the proofs of ignorance it contained were scarcely credible. I entertain no doubt, nor will any careful reader acquainted with Lord Brougham's style entertain any doubt, that the article was chiefly written by Lord Brougham; and it is to Lord Brougham therefore that I address this part of my performance.

Let me in the first instance admit, that I was the aggressor: Lord Brougham's attack was not unprovoked: I began the controversy by a censure directed at Lord Brougham's indifference when in office to the reforms of the law, which out of office had appeared to him so essential: that Lord Brougham should resent such an attack was natural enough; that he should exhibit his resentment in an anonymous review, under the character of an impartial judge, and by a general attack, was perhaps not very much to be wondered at; but that he should in that attack attribute to me opinions I never uttered, and cite, as contained in the work which he vouchsafed to notice, passages that, on an examination, it will be found not to contain, is what I now complain of, and what I hope will be thought by dispassionate readers sufficient to justify

the following lines in my vindication. Lord Brougham affirms that I say Lord Mansfield was not a great lawyer. If I had done so, I should not want authorities (*a*). But I have always looked upon such opinions as mere effusions of pedantry: I have always thought Lord Mansfield a great lawyer. What I have said is, that Lord Mansfield was hardly to be called a great *man:* the passage in which I praise Lord Mansfield's efforts to digest and methodize the law will satisfy any candid reader that I never could have put forward the opinion ascribed to me by Lord Brougham.

Lord Brougham asserts that I call Lord Bacon an honest Judge: there is not an expression that, by any possibility, can be tortured into such an interpretation in any part of my pamphlet.

Lord Brougham says I commend the worst excesses of the French Revolution. Before I state what I did say I will make one remark. Lord Brougham says in his Life of George IV., speaking of George the Fourth's separation from the Whigs on account of their difference as to the French Revolution,—"He (George IV.) came forward to disclaim them (the Whigs,) to avow that his sentiments differed widely from theirs, and to declare that, upon the great question which divided the world (the French Revolution,) he took part with the *enemies of liberty and improvement.*" Would Lord Brougham think it just or candid in any of the numerous objects of his different attacks to accuse him, on the authority of this passage, of

(*a*) Dunning among the rest.

applauding the massacres of September? And the reader will observe, that I am not quoting the expressions of Mr. Brougham, expressions, of course, quite obsolete and antiquated, and not to be named among Conservatives, but the expressions of Lord Brougham deliberately printed in a most elaborate work, and entitled to all the weight that his authority can confer (*a*).—As to myself, I commend the aboli-

(*a*) I have praised specifically the vote of the Assembly on the 4th of August. This praise Lord Brougham has attacked me for, saying, that it involves a praise of the worst part of the French Revolution. Now, will the reader believe that what follows is a literal extract from Lord Brougham's writings, published 1846. After saying that the "grievances of the feudal system were felt more severely in France than in any other country, and completed the miseries of the people" (observe there could be no mistake about what I had praised, for I said, speaking of our *Game* Law, we shall look in vain for any measure like that of the 4th of August in France), he adds:—

(*Lord Brougham's Statement of the Times of George III.*, page 9, vol 2.)

"Of all the changes effected by the Revolution, there was none which went more home to every Frenchman's bosom than the famous decree, *sweeping away all feudal privileges. The vote of the Assembly, on the 4th of August*, diffused joy over all France, such as perhaps no other act of legislative power ever excited. It may be said, without a figure of speech, to have raised one universal shout of exultation through the whole expanse of that vast and populous country. The language applied by Mr. Burke to the memorable proceedings of that night, and which termed it the "St. Bartholomew of the privileged orders," was employed by but a very few, and did not express the sentiments prevailing even among the members of those orders themselves, from whom indeed the proposition mainly had proceeded."

Lord Brougham, Law Review, 1847.

"Such a Tract, with its recommendations of the French Revolution in *nearly* the *worst part*, certainly the most precipitate, of that long and frightful tragedy," &c., &c.

He then, after enumerating some incident which brought back this very vote, that it is so very criminal in me to praise, to his mind, says,

tion of the feudal rights and oppressive privileges, the *droits de chasse* among the rest, which Lord Brougham knows, or ought to know, Turgot had ineffectually attempted to destroy—which common sense and common humanity, nay, the very existence of social order, imperatively called for, any abolition of which, by a single measure and at once, may always be called in one sense precipitate—just so, the abolition of the Corn Laws, or the Bill for Catholic Emancipation, or the Reform Bill, may be called precipitate.

If it is meant by precipitate, however, that the French had not given the system of feudal burdens—insulting privileges, a sufficiently long trial—if it be meant that they could not refer to experience in proof of its miserable effects, no proposition can be more untrue.

If the French representatives had done nothing more than abolish those mischievous and absurd institutions, they would have entitled themselves to the everlasting gratitude of their country; and their having done so, was some atonement to France and to all the world for the crimes and errors into which they fell—and this is a fact which I should have thought

"The incident is exceedingly trivial in itself; but I shall not easily forget its effect in carrying me back to the *great scenes of the Revolution, ere yet its path had been stained with blood*, while *virtuous men might honestly exult in its success*, and the friends of their species could venture to hope for the unsullied triumphs of the sacred warfare waged with long-established abuses." I had rather my reader should find the phrase for inconsistency so flagrant, than I, but I will venture to ask Lord Brougham, whether to expect that he will hold the same opinions on such a measure as the 4th of August for a single year, be unreasonable.

no supporter of abuses in the nineteenth century could have been so infatuated, whether by ancient prejudices, or recent apostacy, as to deny. For Lord Brougham there is a short answer; either he does mean to deny it, and then to argue with so furious a renegade would be waste of time—or he does not mean to deny it, and then his attack on what I have written is without a pretext for its justification.

But I do not do Lord Brougham justice as a law reformer. Now, of all people, Mr. Bentham must be admitted by law reformers to be the most competent judge on this subject. His singleminded devotion to Law Reform, as the object of his life; his disdain for all the trash which the great vulgar hunt after with such avidity; his prodigious learning, his unrivalled acuteness, his inexhaustible patience, his thorough knowledge of every thing connected with the subject; his luminous and comprehensive views, joined to a courage that no terrors could daunt, and a probity that no temptation could overcome—this constellation of great and rare qualities justifies me in saying that neglected, and slighted, and slandered during his life, he will be revered by posterity as the greatest of our law reformers. But he was unfriendly to Lord Brougham. Far otherwise; he was his "venerable friend," the sage who educated him. Lord Brougham declared, in the House of Commons, that he looked up to him with filial reverence, and as a pupil to his tutor. He cannot decline his jurisdiction. What, then, was the opinion of this man, so eminently qualified to judge of Lord Brougham as a law reformer. "*Amicus*

Plato, sed magis amica veritas." "Would that by any thing I could say or write I could turn aside my noble learned friend from *bit by bit*, ill-considered, uncon-cocted, incoherent, and unseasoned supposed reforms and improvements in legislation." Page 564, part 6, *Bentham's Works, Lord Brougham Displayed.*

"The closer the scrutiny into that measure (the Bankruptcy Court) became, the more deeply did I become impressed with the painful persuasion, that in a man in whom for a long course of years I have had the honour and happiness to possess a familiar friend—it was my unhappy lot to *behold an adver-sary, an irreconcileable adversary*—to what? *to Law Reform.*" Page 553, *ib.* Again, p. 60, *Lord Brougham Displayed*, "Four occurrences present themselves as most prominent of those which have concurred in the production of this distressing persuasion (that Lord Brougham was an enemy to Law Reform):

1. The Charity Enquiry Job.
2. The Advocacy of Fee Gathering.
3. The Opposition to the Ballot (*that Lord Brougham has now put an end to*).
4. His Education Jobs."

Lord Brougham says, "I cannot be so ignorant of Parliamentary history as not to know that Lord Ellenborough was impeached," and then adds, that "no supporters could be found of that impeachment," in other words, that he was *not* impeached. Whether it be habitual inaccuracy, or an earnest desire to censure, that led Lord Brougham to this statement, in

which he contradicts himself, I am unable to determine. This, however, I do know, that when the expression was used,—"Lord Ellenborough ought to have been impeached for his conduct on Lord Cochrane's trial," every reader, of common sense and common candour, would understand that something more was meant by it than what Lord Brougham himself elsewhere (will the reader believe it) calls "a senseless show of impeachment" (*a*), an unsupported motion in the House of Commons. But Lord Brougham says, and here at least he is consistent with his assertion in the life of Lord Ellenborough, that Lord Cochrane's trial was conducted like any other, and that this fact was admitted by the counsel concerned. What the counsel concerned, among whom I remark the names of Mr. Alan Park and Lord Winford, may have admitted, I know not. But does Lord Brougham really mean to deny, that the sentence has stamped upon it, in characters indelible, the savage fury of a political enemy? With regard to the trial, I will tell Lord Brougham what I suppose he does not know, that Lord Ellenborough, in spite of his most earnest supplications, compelled Lord Cochrane's counsel, the man to whom was committed the defence of one whose name is inseparably associated with some of the most splendid achievements in our naval history, exhausted as he was by incessant fatigue, to make his speech for his client at twelve at night, to a jury as worn out as himself; and that immediately after the

(*a*) Life of Lord Ellenborough, p. 219. Times of George III.

speech for the defence Lord Ellenborough adjourned the Court till twelve the next day, to enable the counsel for the prosecution to prepare his reply: I say nothing of Lord Ellenborough's summing up, which is the speech of an advocate; but if Lord Brougham really thinks such proceedings just, his notions of justice are as singular as his ideas of political consistency.

Again, does Lord Brougham mean to deny, that Lord Ellenborough was hasty, violent, and arbitrary (*a*)? He, himself, in his Life, allows that he was, and that he allowed his political feeling to bias his observations. Lord Dudley, in his letters, says the same thing; and what is more remarkable, Lord Dudley, in his criticism on Miss Edgeworth's "Patronage," printed in the Quarterly Review, alludes to Lord Ellenborough's well known severity where the Press was concerned. Does Lord Brougham recollect the rebuke that Lord

(*a*) As a proof that my opinion of Lord Ellenborough was that of his contemporaries, I quote from the *Annual Register*, a Tory publication, an account of a trial for libel before him, in which Lord Brougham was counsel for the defendant. The defendants had published statements exactly true of the Prince Regent. After saying that "adultery was venial,"—language which even shocks the *Annual Register* in the mouth of a Lord Chief Justice on the Bench,—"Lord Ellenborough began his charge to the jury by a severe censure of the defendant's counsel, Mr. Brougham, who, he said, *had imbibed the spirit of his client*, and seemed to have *inoculated himself with all the poison and mischief* which this libel was calculated to effect."

"His Lordship concluded a charge *much more forcible against the defendants than the speech of the Solicitor General*, by apostrophising the jury," &c., &c. "If there was one man of the twelve, who, pledging only the veracity of a gentleman, could say this was not a libel, he must remind that man of the more sacred sanction of an oath, which bound him to administer justice according to that law by which he pronounced this a foul, atrocious, and malignant libel."—*Annual Register*, 1812, p. 279.

Ellenborough's violent and brutal manner drew down upon him from Lord Grey in the House of Lords? Is it very probable that the man whom Lord Brougham himself calls a violent partizan, who forgot the dignity and decencies of life in the House of Lords, when he was surrounded by his superiors, would observe them punctiliously on the Bench, when he had no equal? To what purpose then does Lord Brougham deny facts that are so notorious? Again, Lord Brougham says that I am mistaken in saying, that to call Lord Sidmouth the Doctor "was a libel;" he will find it distinctly asserted by Lord Ellenborough and Mr. Perceval, then Attorney General.

He says, "no prosecution was instituted for it;" before he contradicts he really ought to take some little pains in ascertaining the truth. Here is the proof that I was right in both assertions, and he was wrong, and that what he goes out of his way so positively to deny did actually take place.

"Great characters in high situations," a phrase employed *about December*, 1809, *by minister Perceval, then Attorney General, in calling down the vengeance of the law on I forget what alleged libeller, for the using the appellation of "the Doctor" in speaking of Lord Sidmouth.* By the picture it seemed to give of the character of the prosecution, and of the persons who bore a part in it, it made a lasting impression on my mind" (*a*).

When Lord Brougham reads this, he may perhaps feel a little ashamed of contradicting what it is so very

(*a*) Bentham's Works, p. 463, Part IV.

easy to establish. Lord Brougham wonders that I attack Lord Eldon: I might refer him to his own votes and speeches to explain my bad opinion of that most interested, insincere, and narrow minded of mortals; but I will quote Romilly's opinion of Lord Eldon instead.

"The determined opposer of every thing good, the zealous and indefatigable supporter of every thing evil, which might contribute, in however small a degree, to the benefit of those in power."

Again—"Under his management of twenty years the Court of Chancery was the disgrace of civilized society."

Again—the "evil genius" of his country.

Lord Brougham asks, why I say a "Flavian prosecution was set on foot against Romilly." I answer by referring to "Romilly's Memoirs." He attacks my assertion, that inferior men were selected for high stations.—Above all, my answer is, let him read what he himself has elsewhere spoken and written, "*ad nauseam*," on that topic; 2ndly, let him look at Romilly's Memoirs; 3rdly and lastly, let him look at this very article, in which, desiring to contradict my assertion, he has selected from the State, the Law, and the Army, with which last I have nothing to do, between 1806 and 1828,—How many names does the reader suppose?—Exactly twenty; and among them some that strongly corroborate my assertion, and not five, except soldiers, ever heard of out of England. Does he suppose, if I were to furnish out my catalogue, that the list would end so speedily?

Again, Lord Brougham cavils at my applying to Cromwell, Milton's words "chief of men."

"We know not in what passage the praise occurs."

"Milton might speak of him as having reached the summit of power." Excellent! It shews altogether such thorough acquaintance with Milton's style, to suppose that he would apply the words "chief of men," to a man whom he thought an unprincipled tyrant, because he was successful!—and such intimate knowledge of Milton's works not to know a passage so famous, and so stamped with the writer's genius. It is hard to say whether the difficulty or the solution be more creditable to Lord Brougham as an English scholar—with great humility, however, I beg to inform his Lordship, that the words in question are in Milton's sonnet to Cromwell after his victories at Dunbar and Worcester—and were certainly meant to express the highest admiration for the illustrious man to whom they were addressed.

Lord Brougham follows up this judicious gloss, on one of the best known passages in the language, by questioning the wisdom of alluding to Cromwell as a law reformer—because he assumed absolute power, and this remark is made by a man who cited Napoleon as a law reformer in the House of Commons! I will not dwell on what I consider his misrepresentation of Cromwell's character, who, with all his faults, was the first of English statesmen, but when he takes upon himself to expound Whig doctrines, I must confess, that I think he is the very last person the Whigs would employ to draw up the articles of their creed.

He taunts me with being a recent ally of that party, be that as it may, he may be assured, that neither from that party, or any which I may gain power and station and popularity by supporting, shall any one accuse me truly, of being, on obviously personal motives, a deserter.

Lord Brougham says that special pleading contracts the field of chance, and never causes a case to be decided for reasons unconnected with its merits! The value of these assertions may be safely left to the opinion of any one who can read, and will open any one volume of our reports. They may be refuted by the evidence of the senses, and can only proceed from the most incorrigible bigotry, or, from some cause still more odious. Perhaps Lord Brougham thinks that as the importance of technicalities increase, the field of chance is contracted,—or that special pleading is not technical, or perhaps he thinks—he may hazard any assertion that is convenient.

It is only from the ignorance of the practitioner that a technical objection can arise says Lord Brougham (*a*). If so, the Holroyds, the Littledales, the Abbotts, the Gibbs, and the Richardsons, &c. must have been most ignorant, and so as the books are full of little else, must the whole race of lawyers have been from the earliest times to the present—and Lord Brougham must excuse me if I say that *he* is not the person to

(*a*) See *Bayley* v. *Holford*, and the other cases cited above, where the pleadings, in which a fatal flaw was discovered, were drawn by the best pleader at the bar, as specimens of this system that contracts the field of chance!

talk about ignorant practitioners, in matters connected with special pleading.

With regard to the comments on the cases I have cited—the cases of *Hayter* v. *Moat* and of *Harrison* v. *Matthews* (the last of which he contents himself with saying is wrongly stated without any pretence of reason or examination), were pointed out to me not more by the loud complaints of many able practitioners, than by the lamentation of the Judges themselves over the injustice they were forced to perpetrate. The case of *Forsyth* v. *Rotherham* was quoted by me, as Lord Brougham very well knows, to shew that our system did not *prevent* evils insisted upon by some as the consequence of a code, while it has others peculiar to itself. His defence of our law is curious. *Gill* v. *Cubitt*, he says, overruled the old law, and therefore when it was overruled, the old law was restored; does he mean by this to prove that our law is free from the fluctuation and uncertainty which we are always threatened with as the necessary evil of a code ?

Lord Brougham says that my assertion "that the expense of amendment is so considerable, that in most cases it is better to abandon the suit entirely," is an unpardonable exaggeration. Nothing is more true. The average sum sought to be recovered in a common law suit is far under thirty pounds. I believe about fifteen. The average expense of amending, after a demurrer, is more than thirty.

Lord Brougham quarrels with me for saying that the Bench under the Stuarts was occupied by men who

were the pests of the Profession, and their country. Does he mean to deny it? Let him read the State Trials.

He glances at my calling Sir Robert Sawyer "a wretch" in a note. Lord Brougham should really pay some attention to history. He cannot mean to say that the term or any expression denoting horror for a man stained with the foulest crimes is too strong, unless like the clown in Twelfth Night, he is "one of those who will not call Satan himself by a bad name," a character of which up to this moment he has not been very ambitious. But if the term "wretch" may be applied to Jeffreys, it surely may be applied to Sawyer. Sawyer was the principal and active instrument in the murder of Sir Thomas Armstrong. For this he was in better days expelled the House of Commons. He afterwards in like manner assisted to destroy Mrs. Gaunt, who was burnt to death without a shadow, or the shade of a shadow of evidence. I call a lawyer, who causes a man without trial to be embowelled, and an innocent woman to be burnt alive—"a wretch;" and so the House of Commons seems to have thought him. What milder name Lord Brougham will suggest remains to be seen. When he made his speech on the Missionary Smith, and against the Holy Alliance, he was not so courtly. "When there came before the legislation," says Mr. Brougham, "a case remarkable in itself,—I mean the trial of Sidney," (a case, by the way, bad as it was, far inferior in enormity to the case of Armstrong, or of Mrs. Gaunt,) "did our illustrious predecessors shrink back from

the honest and manly declaration of their opinion in *words suited to the occasion*, and screen themselves behind *tender phrases?*"—"in those days no such language was holden; the word 'murder' was used—because the deed of blood had been done." "That Judge was Jeffreys, the chief and head of unjust, corrupt, and cruel Judges;—there shall he stand hateful to all posterity; but there he would *not have stood*, and his name might have come down to us with *less appropriate* and *far other distinction*, if our forefathers had consented to *fritter away the expression of their honest indignation*, to mitigate the severity of that record which should carry their hatred of injustice to their children's children," &c. &c.—*Missionary Case, Lord Brougham's Speeches*, page 123, vol. 2.

If these pages of vituperation had occurred to Lord Brougham, he would hardly have thought the single word "wretch," applied to a man quite as bad as Jeffreys, and with reference to matters far worse than he is speaking of, exceptionable. Lord Brougham charges me with exaggeration:

"ἀνὼ ποταμῶν ἱερῶν χωροῦσι παγαί!"

My answer is, I have proved all he has denied to be true, and most of what he has asserted to be erroneous.

But while upon exaggeration, may I venture to observe that the excessive praises with which Lord Brougham's name is smothered wherever it occurs in the Law Review (even considering that he has obliged the Society for Law Reform to provide each of its members with a copy of it, fostering it with

no step-mother's care), a little border upon that fault. They verge also on another fault imputed to Paracelsus (also a great man) in his day, well known as that which Butler (*a*) has made the characteristic of Sidrophel, and which I need not specify more particularly.

Lord Brougham's few remarks on the Roman law betray such complete and bottomless ignorance of the subject—they confound together periods of its history so totally distinct, that they are really below any notice. It is clear that he knows as little of the subject, as he did at Wakefield's trial. To reason with the man who says that the Roman pleading, which Lord Brougham seems to think, was the same in the days of the first Punic war, of Cicero, the Antonines, and Constantine, and which, as I have said above, was so moulded by the magistrate as to make any technical mistake impossible—resembles ours, would be ridiculous; and, if Lord Brougham will condescend to

(*a*) Butler's lines are worth quoting :—

"Do not our great reformers use
This Sidrophel to forebode news.

"He had been long *towards mathematicks,*
Opticks, philosophy, and staticks.

"But, *as those fowls that live in water*
Are never wet, he did but smatter ;
Whate'er he labour'd to appear,
His understanding still was dear ;
Yet none a deeper knowledge boasted,
Since old Hodge Bacon, and Bob Grosted.

"*He knew whats'ever's to be known,*
But much more than he knew would own."

BUTLER'S POEMS.

examine any of the standard writers on the history of the Roman law, I am sure he will thank me for my forbearance in dwelling no longer on the subject.

To conclude, it is said somewhere by Rousseau, that a man may congratulate himself on the censure of some people, as much as on the praise of others, and I leave it to the reader to determine, whether I have not a double cause of satisfaction, when I reflect that Lord Denman has been good enough to notice favourably the essay, which Lord Brougham has thought proper, from whatever motive, so recklessly to attack.

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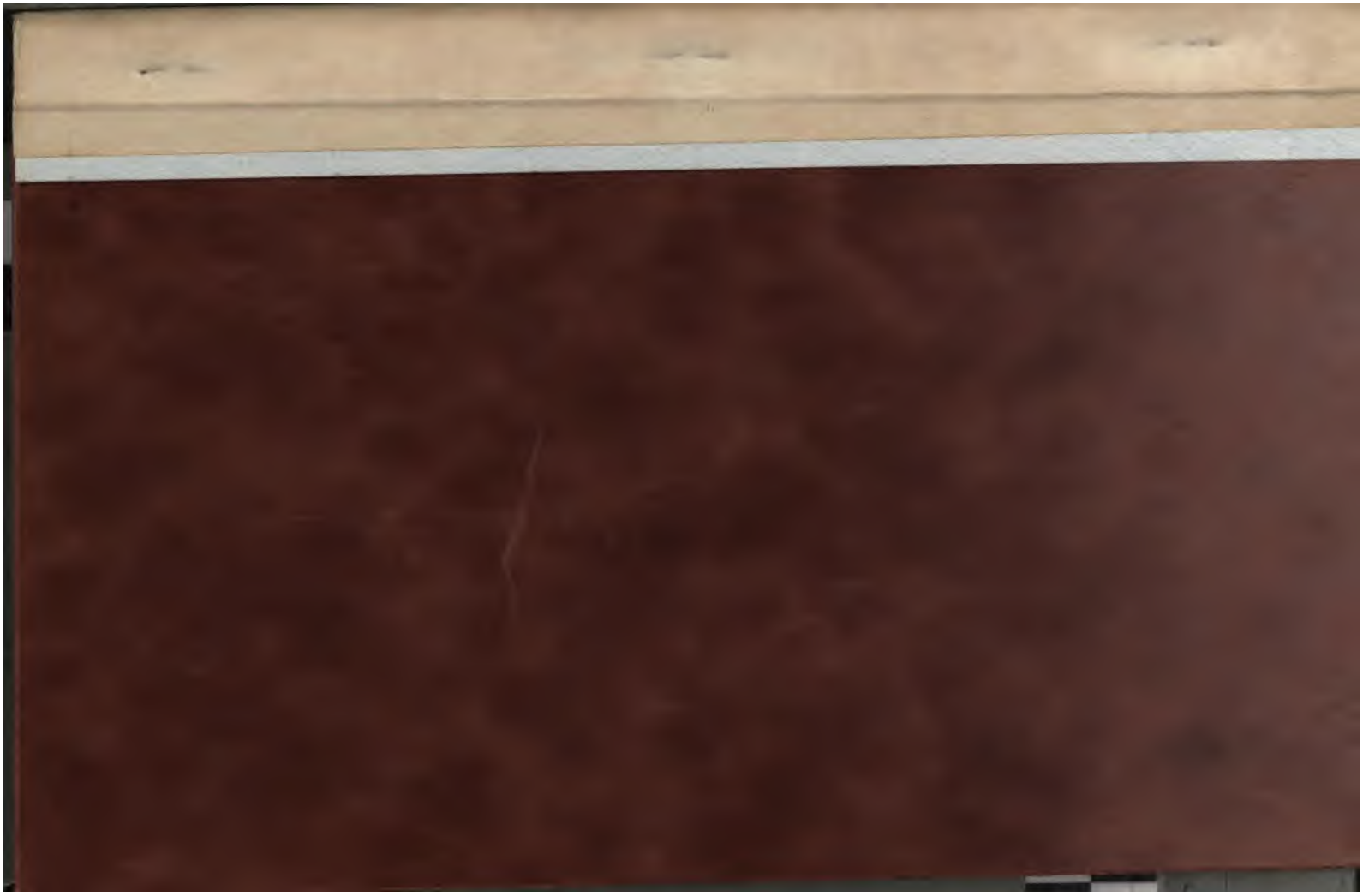
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